No. 09-1476

In the Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, ET AL.,
Petitioners,

v.

CHARLES J. GUARNIERI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTEREST OF AMICUS[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Third Circuit Court of Appeals should be affirmed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation*, released in 2010.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Millions of Americans are employed by federal, state, and local governments. These citizens do not forfeit their constitutional rights as a condition of employment.

Sometimes constitutional rights must yield to overriding government interests, and courts routinely uphold reasonable time-place-manner restrictions.

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

These principles hold true in the sphere of public employment, protecting the employer's legitimate interests in workplace order. However, restrictions should be narrowly tailored to serve those interests without eviscerating the First Amendment.

Rather than attempt to smooth the jagged line between "public" and "private" concerns in the employment context, the Third Circuit wisely distinguished between sham and genuine petitions. True petitions warrant formal review and offer remedies for real legal wrongs. Even as employer, the government cannot shut off the channels for citizen-employees to redress valid grievances. Importing the "public concern" test would grant employers carte blanche to retaliate and leave employees vulnerable—even for invoking the carefully crafted state remedies Petitioner alleges will be displaced without that threshold.

Respondent was initially terminated for exercising his right to be free of compelled speech concerning a matter unrelated to his job. He followed the procedures in a collective bargaining agreement the Borough signed—then faced a *second* round of retaliation for doing so. Mandating a "public concern" for the second complaint would sanction an end-run around the Constitution.

ARGUMENT

I. GOVERNMENT EMPLOYERS ARE NEVER ENTIRELY ANALOGOUS TO PRIVATE EMPLOYERS. THE GOVERNMENT MUST MAINTAIN OPEN ACCESS FOR REDRESS OF GRIEVANCES FOR *ALL* ITS CITIZENS, INCLUDING ITS OWN EMPLOYEES.

Over two centuries ago, this Court proclaimed that:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

Retaliation against a public employee who petitions "violates the literal language of the Petition Clause." *Gable v. Lewis*, 201 F.3d 769, 772 (6th Cir. 2000). Even as employer, no government entity may foreclose a citizen's ability to access the judicial system for genuine grievances. Every legal right must have a remedy. *Marbury v. Madison*, 5 U.S. at 163. There is effectively no remedy for a citizen-employee who must choose between employment and the ability to formally redress an employment-related grievance. Application of the "public concern" test to petition cases "distorts a distinct right that was designed to ensure government accountability to its citizens." Margo Pave, Comment:

Public Employees and the First Amendment Petition Clause: Protecting the Rights of Citizen-Employees Who File Legitimate Grievances and Lawsuits Against Their Government Employers, 90 Nw. U. L. Rev. 304, 336 (Fall 1995).

The right to petition has ancient origins and was utilized by early American colonists. It was firmly established in the common law tradition by the time the Bill of Rights was drafted. *Foraker v. Chaffinch*, 501 F.3d 231, 235 (3d Cir. 2007). Initially it encompassed a right to be free of retaliation for its exercise, and some commentators even maintain that speech, press, and assembly "originated as derivative rights insofar as they were necessary to protect the preexisting right to petition." Pave, 90 Nw. U. L. Rev. at 309-310, quoting Stephen Higginson, Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions*, 106 Harv. L. Rev. 1111, 1113 (1993). The right to petition is one of "'the most precious of the liberties safeguarded by the Bill of Rights,' *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217 (1967)...implied by 'the very idea of a government, republican in form.' *United States v. Cruikshank*, 92 U.S. 542, 552 (1876)." *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 524-525 (2002). This Court refused to apply the Sherman Act so as to preclude the solicitation of government action—even though petitioners intended to restrain trade. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). "[E]xcept in the most extreme circumstances citizens cannot be punished for exercising this right 'without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions,' *De Jonge v. Oregon*, 299 U.S. 353, 364

(1937)." *McDonald v. Smith*, 472 U.S. 479, 486-487 (1985) (Brennan, J., concurring) ("*McDonald* ").

The government employer is still *government*—a state actor. "[A]ctions taken by the state...are subject to constitutional scrutiny"—private actions are not. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974). The doctrine of state action forecloses the attempt to split the government entity and draw a constitutional line between the government-as-employer and government-as-government. In light of the government's "concurrent role as sovereign, the government-as-employer bears constitutional responsibilities not shared by private employers." Pave, 90 Nw. U. L. Rev. at 336. The Fourteenth Amendment prohibited the government from practicing racial discrimination, even as employer, long before the Civil Rights Act of 1964 was passed. *Id.* at 335.

In spite of overlap in First Amendment rights, petitioning is substantively different than speech because it addresses a distinct audience: the government. "Whereas the Free Speech Clause protects the right to 'wide-open' debate, the Petition Clause encompasses only activity directed to a government audience." *Foraker v. Chaffinch*, 501 F.3d at 237. It is one thing for an employee to air grievances before the public, and quite another to initiate formal action seeking a remedy. Pave, 90 Nw. U. L. Rev. at 339.

Employment touches basic liberties because "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the

First Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41 (1915). The government "cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-606 (1967). *See also Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Branti v. Finkel*, 445 U.S. 507, 515-516 (1980); *Connick v. Myers*, 461 U.S. 138, 142 (1983) ("*Connick*"); *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006). Nor can the government condition public employment on the employee's forfeiture of the right to pursue a formal remedy when the government employer transgresses his constitutional or statutory rights.

> [A] citizen who works for the government is nonetheless a citizen. The *First Amendment* limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens.

Garcetti v. Ceballos, 547 U.S. at 419. One of those liberties is access to a legal remedy for a government employer's wrongdoing.

A. Most Circuit Courts Gloss Over The Distinction Between The Petition Clause And Other First Amendment Rights.

The Petition Clause is not a superfluous appendage to the First Amendment. It is a right with independent significance:

> It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.

Marbury v. Madison, 5 U.S. at 174.

Many Circuit Court decisions conflate the public employee's rights to speak and petition—repeating *Connick's* "public concern" test with little (if any) analysis or rationale:

- *Tang v. Dept. of Elderly Affairs*, 163 F.3d 7, 12 (1st Cir. 1998) (glides over the right to petition, rehashing the *Connick-Pickering* standard for free speech)

- *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993) (presumes petition right is "generally subject to the same constitutional analysis" as free speech—based on a footnote in *Wayte v. United States*, 470 U.S. 598, 610 n. 11 (1985), a case that did not involve public employment and did not separately analyze speech and petition rights because the petitioner had not argued that each right was burdened differently)

- *Andrew v. Clark*, 561 F.3d 261, 269 (4th Cir. 2009) (found viable petition claims but failed to discuss Petition Clause in depth—impliedly assumes applicability of "public concern" test)

- *Kirby v. City of Elizabeth City*, 388 F.3d 440, 448 (4th Cir. 2004) (discusses Petition Clause but relies on generalizations in *McDonald* that

it is "cut from the same cloth" and "inspired by the same ideals" as other First Amendment protections)

- *Brinkmeyer v. Thrall Indep. Sch. Dist.*, 786 F.2d 1291, 1294 (5th Cir. 1985) (assumes that *Connick* applies to all "public employee claims under the First Amendment")

- *Day v. S. Park Indep. Sch. Dist.*, 768 F.2d 696, 701 (5th Cir. 1985) (Petition Clause applies when *other* First Amendment rights are implicated)

- *Rathjen v. Litchfield*, 878 F.2d 836, 842 (5th Cir. 1989) (conflates speech and petitioning, assuming "public concern" test applies to both)

- *Belk v. Town of Minocqua*, 858 F.2d 1258, 1261 (7th Cir. 1988) (glosses over the distinction between speech and petitions, noting that libel is not protected under either clause)

- *Altman v. Hurst*, 734 F.2d 1240, 1244 n. 10 (7th Cir. 1984) (conflates "First Amendment rights" under *Connick* and says that "a private office dispute cannot be constitutionalized merely by filing a legal action")

- *Hoffman v. Mayor of Liberty*, 905 F.2d 229, 233 (8th Cir. 1990) (merges speech and petition rights, holding they are "cut from the same cloth" and thus the court need not determine "if (or how) the petition clause is distinct from the speech clause or whether Hoffmann's grievance filing was an act of petition or of speech")

- *Gunter v. Morrison*, 497 F.3d 868, 872 (8th Cir. 2007) (conflates the rights of speech and petition, based on *Hoffman's* holding that it "need not determine" whether the Petition and Free Speech Clauses are distinct)

- *Rendish v. City of Tacoma*, 123 F.3d 1216, 1219-1220 (9th Cir. 1997) (conflates petition and speech rights, assuming "public concern" applies test to both, but admits that Petition Clause independently protects litigation)

- *Martin v. City of Del City*, 179 F.3d 882, 887 (10th Cir. 1999) (conflates speech and petition, assumes *Connick* standard applies to both)

- *Renfroe v. Kirkpatrick*, 722 F.2d 714, 715 (11th Cir. 1984) (assumes "public concern" test applies to employee grievance)

- *D'Angelo v. Sch. Bd.*, 497 F.3d 1203, 1211 (11th Cir. 2007) (assumes that "public concern" test applies to petition activity, relying on *McDonald's* "cut from the same cloth" dicta)

The Petition Clause independently protects the right to have a meritorious complaint heard and adjudicated. But these Circuits give short shrift to this right, collapsing it into the Free Speech Clause without considering that a different audience is addressed and different purposes are served. The Petition Clause provides access to a potential remedy, not merely the opportunity to "air" opinions.

> [T]hese decisions conflate two distinct constitutional rights...the act of petitioning

> itself is given no protection; only the speech contained within the petition is constitutionally protected, and then only if it satisfies the standard for protection applicable under the Free Speech Clause. This approach robs the Petition Clause of any independent meaning and ignores its history as a distinct and significant source of protection.

Pave, 90 Nw. U. L. Rev. at 326.

The other circuits are not quite as uniform as Petitioner asserts. Although *most* other circuits depart from the Third Circuit's analysis, Petitioner ignores Sixth Circuit precedent with the claim that *all* ten other circuits "have uniformly held that claims like respondent's are not cognizable." App. Brief, 4. Petitioner's lone Sixth Circuit citation refused to extend the "public concern" test to the speech of *parents—not employees*—who criticized a school district. App. Brief, 5, citing *Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d 580, 587 (6th Cir. 2008). Elsewhere—in a case *Jenkins* found dispositive (*id.*)—the Sixth Circuit stated that:

> [W]e find no authority in the Sixth Circuit limiting petitioning activity by public employees to matters of "public concern" either generally or in the governmental employment context.

Gable v. Lewis, 201 F.3d at 771-772 (auto towing company owner sued police official for removing her from the patrol's referral list in retaliation for her sex discrimination complaint). In *Gable*, the Sixth Circuit looked back to *Valot v. Se. Local Sch. Dist. Bd. of Educ.*, 107 F.3d 1220 (6th Cir. 1997), where *one* judge

would have limited employee petitions to "public concerns" but *three* others—two concurring judges and one dissenting—disagreed. In *Valot*, school bus drivers were not rehired for the next school year because they applied for unemployment benefits over the summer, not realizing the School Board would have to pay those benefits dollar-for-dollar. The concurring judges did not consider the unemployment applications to be "petitions," noting there is no *constitutional* right to these benefits. *Valot v. Se. Local Sch. Dist. Bd. of Educ.*, 107 F.3d 1220, 1230-31 (6th Cir. 1997) (Ryan, J., concurring). The dissent would have protected the employees because they successfully invoked a *statutory* right. *Id.* at 1234 (Merritt, J., dissenting).

Outside the Third and Sixth Circuits, other courts cite broad statements—often dicta—about how First Amendment rights were "coupled in a single guaranty" (*Thomas v. Collins*, 323 U.S. 516, 530 (1945)), "cut from the same cloth" (*McDonald*, 472 U.S. at 482) or "inspired by the same ideals" (*id.* at 485). But "[t]he *Connick* Court was not faced with a claim of violation of rights of association and petition." *Stellmaker v. DePetrillo*, 710 F. Supp. 891, 892 (D. Conn. 1989) (teacher transferred to less desirable post in retaliation for pursuit of collective bargaining grievance). Similarly, *McDonald* was not faced with a meritorious petition about any constitutional or statutory violation—but with libel. Free expression does not encompass the right to defame or deceive. Intentional falsehoods are not protected under any constitutional clause. Neither *Connick* nor *McDonald* should not deny protection for an employee's meritorious, non-sham grievance.

B. Only Sham Or Libelous Petitions Are Beyond The Reach Of The First Amendment.

Petitioner argues that the "public concern" test is necessary to prevent employees from characterizing every grievance as a petition and every response as unlawful retaliation. App. Op. Brief, 13, 14. But the Petition Clause only protects genuine, non-sham grievances that warrant formal action. "[It] does not provide blanket immunity for unlawful conduct." *Thorne v. Bailey*, 846 F.2d 241, 244 (4th Cir. 1988) (conviction for telephone harassment). *See also City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (police officer could be terminated for distributing sexually explicit videos). Some expression—libel, intentional misrepresentation (fraud), frivolous litigation—is not protected by *any* constitutional provision.

> Constitutional rights have outer limits. Other than the right to believe [*Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940)], none is absolute. The Free Speech Clause does not shelter defamatory speech or "fighting words." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The right to petition is also not absolute. *McDonald*, 472 U.S. at 485. But not all rights have identical parameters. The Third Circuit's thorough analysis defined the contours of the Petition Clause by distinguishing between true and sham petitions, concluding that "[t]he mere act of filing a non-sham petition is not a constitutionally permissible ground for discharge of a public employee." *San Filippo v. Bongiovanni*, 30 F.3d 424, 443 (3d Cir. 1994); *see also Foraker v. Chaffinch*, 501 F.3d at 236; *Brennan v. Norton*, 350 F.3d 399, 417 (3d Cir. 2003).

San Filippo followed this Court's precedents. Filing a lawsuit is a form of petitioning, but "baseless litigation is not immunized by the First Amendment right to petition." *McDonald*, 472 U.S. at 484, quoting *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983); accord, *Cal. Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972) (genuine petition immune from anti-trust liability, but not sham petition); accord, *BE&K Constr. Co. v. NLRB*, 536 U.S. at 525-526 (same); *see also Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (no protection for intentional falsehoods in petition to the President). *Bill Johnson's* held that an employer's suit could not be enjoined as an unfair labor practice unless it lacked a reasonable basis—even where the employer filed it to retaliate against employees exercising their First Amendment rights. *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. at 743, 748-749 (employee defendants engaged in mass picketing, harassed customers, blocked entrance to employer's restaurant). But a *baseless* lawsuit could be enjoined. *Id.* at 744.

The *Bill Johnson's* complaint also contained a libel count. *Id.* at 734. Historically, the petition right recognized in England was so broad that it may have included freedom from libel prosecution for the petition contents. Pave, 90 Nw. U. L. Rev. at 308 n. 26. In *McDonald*, however, this Court held that libelous statements find no safe haven in the Petition Clause. *McDonald*, 472 U.S. at 485. Some states have enacted a "litigation privilege" extending absolute protection—even for libel. *See, e.g.*, Cal. Civ. Code § 47. While not constitutionally mandated, this privilege—like the Petition Clause—encourages free access to the courts. *Silberg v. Anderson*, 50 Cal.3d 205, 211-212 (1990). That policy is overshadowed only

when the elements for a malicious prosecution action are present (*id.*)—and in such a case, the underlying suit is baseless.

Bill Johnson's and *McDonald* are both consistent with the conclusion that "[t]rue petitions...fall within the ambit of the Petition Clause's protection, and the government that does not maintain a channel for such petitions violates a constitutional duty." Pave, 90 Nw. U. L. Rev. at 337. *San Filippo* formulated its analysis based on the distinction between sham and true petitions, rather than the petition contents. *Id.* at 332. That approach corresponds to this Court's precedent:

> "[S]ince sham litigation by definition does not involve a bona fide grievance, it does not come within the First Amendment right to petition." Balmer, *Sham Litigation and the Antitrust Laws*, 29 Buffalo L. Rev. 39, 60 (1980).

Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. at 743.

San Filippo guards access to the judicial system for public employees without opening the floodgates for every workplace grievance. When a public employee files a meritorious action to vindicate a constitutional or statutory right, the suit is not baseless—whether or not it implicates public concerns. On the other hand, where an at-will employee sues a public employer and no such right is at stake, the employee has no legal right to continued employment and the suit is most likely baseless. See, e.g., *Tang v. Dept. of Elderly Affairs*, 163 F.3d at 13 (minor workplace inconveniences not based on race or gender or retaliation for filing union grievance).

C. When Public Employees Are Denied An Avenue For Redress Of Grievances, They Are Placed At A Substantial Disadvantage As Compared To Their Private Counterparts.

Public employees seeking a remedy for grievances face a "stacked deck"—the government stands in the dual role of employer and adjudicator, holding the keys to both employment and the redress of their grievances. If the government-as-employer can slam the courtroom door shut and ignore its constitutional obligations, the public employee has even fewer rights than a comparable private employee with a meritorious employment grievance. The injury is particularly egregious where the employee complains of an independent constitutional violation. Even an at-will public employee may not be discharged "on a basis that infringes his constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. at 597. Otherwise, government could surreptitiously "produce a result which [it] could not command directly"—impermissibly penalizing and chilling constitutional freedoms. *Id.*, citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Citizens employed in the private sphere may access the judicial system for legitimate employment grievances without the "public concern" hurdle. A private employer is not subject to the same constitutional constraints as a public employer, but cannot deny an employee the right to pursue a legal remedy. "Private citizens cannot be punished for speech of merely private concern, but government employees can be fired for that reason." *Rutan v. Republican Party*, 497 U.S. 62, 95 (1990). The government owes no less to its own employees than to other citizens. "The First Amendment's petition clause

imposes on the United States an obligation to have at least some channel open for those who seek redress for perceived grievances." *San Filippo v. Bongiovanni*, 30 F.3d at 442.

1. *Connick* Widened Protection For Public Employees

"[T]he public concern test actually expanded the free speech rights of public employees. *See Garcetti v. Ceballos*, 547 U.S. 410 (noting that *Pickering* and *Connick* changed the dogma that public employees surrender all their First Amendment rights by reason of their employment)." *Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d at 586 n. 1. "The public concern test was meant to form a sphere of protected activity for public employees, not a constraining noose around the speech of private citizens." *Van Deelen v. Johnson*, 497 F.3d 1151, 1156-57 (10th Cir. 2007).

Connick traced the development of the law, noting that "[f]or most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick*, 461 U.S. at 143. *Connick* continued the trend of the 1950s and 1960s to acknowledge and expand public employee rights: *Wiemann v. Updegraff*, 344 U.S. 183 (1952) (striking down loyalty oath denying past affiliation with Communists); *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961) (public employment cannot be denied because of past membership in a particular party); *Shelton v. Tucker*, 364 U.S. 479, 490 (1960) (educators could not be required to list organizational memberships as condition of employment); *Torcaso v.*

Watkins, 367 U.S. 488 (1961) (religious oath for notary public struck down).

2. Denial Of Access To The Judicial System May Constitute A Denial Of Procedural Due Process.

Some public employees have a protected property interest in continued employment. If access to the courts (or a comparable formal mechanism) is denied because the dispute is "private," the "public concern" test effectively denies that employee procedural due process.

Property interests are not created by the Constitution, but "stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). Public employment may or may not be protected: *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (Ohio statute created property right for classified civil servants); *Bd. of Regents v. Roth*, 408 U.S. at 570-571 (professor had no tenure or statutory right to continued employment); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049 (independent towing company had no protected right to demand more towing assignments). But where a protected interest does exist, procedural due process is mandatory:

> While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. at 541 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part)).

3. Association Rights Of Employees May Be Threatened.

The Borough was obligated under a collective bargaining agreement with the Duryea Police Association. This is a classic Catch-22 that dooms the employee who successfully complies with the government employer's established grievance procedures. Guarnieri was reinstated when he exercised his rights in compliance with the Borough's contract. Opp. Pet., 1. The Borough's retaliatory acts offend Guarnieri's right to both due process and association.

Most courts do *not* subject association rights to the "public concern" test:

> Despite the instruction of the Supreme Court that the different guarantees of the First Amendment are "cut from the same cloth," *McDonald*, 472 U.S. at 482, we have not applied the same threshold legal question to public employees who argue that they were terminated in retaliation for exercise of their right to free association as we have to those who argue that they were terminated for their speech or petitions. We have long held that, unlike speech or petitions by public employees, associational activity by public employees need not be on

> matters of public concern to be protected under the First Amendment.

D'Angelo v. Sch. Bd., 497 F.3d at 1212.

But the circuits are not uniform on association claims. The Fifth, Tenth, and Eleventh Circuits would not import the "public concern" test:

- *Boddie v. City of Columbus, Miss.*, 989 F.2d 745, 757 (5th Cir. 1993) ("A public employee's claim that he has been discharged for his political affiliations in violation of his right to freely associate is not subject to the threshold public concern requirement."), quoting *Coughlin v. Lee*, 946 F.2d 1152, 1158 (5th Cir. 1991)

- *Flanagan v. Munger*, 890 F.2d 1557, 1564 n. 7 (10th Cir. 1989) (expressing doubt that the "public concern" analysis would apply to association claims)

- *Schalk v. Gallemore*, 906 F.2d 491, 498 n. 6 (10th Cir. 1990) ("In some constitutionally protected associations, 'public concern' may be an inapt tool of analysis.")

- *Hatcher v. Bd. of Pub. Educ. & Orphanage*, 809 F.2d 1546, 1558 (11th Cir. 1987) (principal's association rights protected)

- *Cook v. Gwinnett Cnty. Sch. Dist.*, 414 F.3d 1313, 1320 (11th Cir. 2005) (school bus driver had right to participate in union-like organization)

The Second, Sixth, and Seventh Circuits would apply the test:

- *Cobb v. Pozzi*, 363 F.3d 89, 102 (2d Cir. 2004) (associational conduct by public employee must touch on matter of public concern)

- *Boals v. Gray*, 775 F.2d 686, 692 (6th Cir. 1985) (same)

- *Klug v. Chi. Sch. Reform Bd. of Trs.*, 197 F.3d 853, 857 (7th Cir. 1999) (same)

This Court's precedents suggest that association rights are *not* subject to the "public concern" test: *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 465 (1979) ("The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so."); *Rutan v. Republican Party*, 497 U.S. at 71 (public employment cannot be conditioned on support from particular political party).

At the very least, this split cautions against thoughtlessly collapsing all First Amendment rights and ignoring their distinctions. These rights are intertwined and overlapping, but not identical.

II. THE COURT SHOULD ADOPT A TEST THAT GUARANTEES MAXIMUM PROTECTION FOR CITIZENS WHO WORK FOR THE GOVERNMENT WITHOUT SACRIFICING GOVERNMENT EFFICIENCY.

This Court should carefully carve out the circumstances where the government employer may

lawfully restrict the constitutional rights of its employees—rather than narrowly defining the situations where employees retain their rights. In *Connick*, this Court was concerned about a public employee's actions *as an employee* rather than as a citizen—and the Court made clear that its "responsibility is to ensure that citizens are [neither] deprived of fundamental rights by virtue of working for the government" nor granted "immunity for employee grievances not afforded...to those who do not work for the State." *Connick*, 461 U.S. at 147.

The Third Circuit rightly begins by asking whether the employee engaged in constitutionally protected activity. *San Filippo v. Bongiovanni*, 30 F.3d at 430. "The problem lies, however, in initially determining whether the citizen-employee's expression is, in fact, 'protected'—for if it is not, the government may restrict it without any justification at all." Pave, 90 Nw. U. L. Rev. at 333. Using the "public concern" test at the outset could facilitate viewpoint discrimination by punishing non-disruptive private speech—or other First Amendment rights—without adequate justification. This turns the Constitution on its head. Private speech ordinarily enjoys the same protection as speech on public matters. *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 223 (1967); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). "We do not suggest...that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment." *Connick*, 461 U.S. at 147. If an employee has engaged in *any* constitutionally protected conduct, a court should first ask whether it actually hindered the government's legitimate interests. Employees may have a stronger interest in

addressing public concerns but they also retain a protected interest regarding private matters.

Government employers do have valid concerns about efficient workplace management this is common sense. Public employees have no right to use "offensive utterance[s] to members of the public or to the people with whom they work." *Waters v. Churchill*, 511 U.S. 661, 672 (1994). A public entity may employ reasonable restrictions to accomplish its mission, which is funded by public money. "When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *Id.* at 674-675.

The public employer's authority in the workplace parallels the time-place-manner restrictions that government may place on First Amendment rights generally. During working hours and at the employer's place of business, the employer may place reasonable constraints on speech and conduct that would otherwise be impermissible.

But even a "legitimate and substantial" government purpose "'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)." *Keyishian v. Bd. of Regents*, 385 U.S. at 602. "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Id.* at 605-606. Employer restrictions on constitutional

rights should actually serve the government's interests.

> A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

Garcetti v. Ceballos, 547 U.S. at 418. In *Pickering*, the case that established the balancing test applied in *Connick*, no close working relationships were involved and there was no interference with either the teacher's job performance or school operations. *Pickering v. Bd. of Educ.*, 391 U.S. at 570, 572-573. More recently, this Court held that a public employer must have some government justification "far stronger than mere speculation" to regulate an employee's off-hours speech on topics unrelated to his employment. *United States v. Treasury Emps.*, 513 U.S. 454, 465 (1995) (federal employee had right to speak, write, and earn outside income in spare time). Here, this Court observed that none of the employee's speech "even arguably [had] an adverse impact" on the employer. *Id.*

A wholesale importation of the "public concern" test into the Petition Clause would broadly restrict access to the judicial system without necessarily serving a legitimate government interest. The test makes no sense where an employee, acting in good faith, utilizes the courts or a formal procedure established by the employer to resolve grievances. It is questionable if stretched beyond the workplace. "*Connick* created the public concern test because government agencies need the ability to maintain order in their workplaces, which [is] inapplicable to the situation of a private

individual petitioning the government for the redress of grievances." *Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d at 587 ("public concern" test inapplicable to parents criticizing school officials).

Connick itself reiterated the caution this Court expressed in *Pickering*:

> Because of the enormous variety of fact situations in which critical statements by ... public employees may be thought by their superiors ... to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.

Connick, 461 U.S. at 154, quoting *Pickering v. Bd. of Educ.*, 391 U.S. at 569.

A. In The Context Of Employer-Employee Relationships, The Line Between Public And Private Concerns Is Often Blurred.

Petitioner laments the complexity of distinguishing a "petition" from simple speech. App. Op. Brief, 31. But the Third Circuit cases Petitioner cites for this lack of clarity are integrally related to formal actions in the employment context – e.g., consulting an attorney, giving notice of intent to file suit, requesting a public hearing. *Id.* The intricacy of separating "public" from "private" presents formidable challenges. If an employee's constitutional or statutory rights are violated, is that a purely *private* matter? Unlawful discrimination concerns a particular employee—but may expose a wider pattern. What if there are multiple "layers" of retaliation, but only one implicates

public concerns? What if an employee's "private" grievance reveals underlying government mismanagement or corruption?

Some cases have identified public concerns where the employee's speech or petition is arguably private. In one case, a city utilities employee sued the city over its refusal to approval his plans for building a residence and access road on parcels he had purchased. This seemingly private lawsuit—unrelated to the plaintiff's job—satisfied the "public concern" test. *Gunter v. Morrison*, 497 F.3d 868. A Presidential assassination attempt is a matter of grave public concern, but what about a casual, inappropriate comment made privately to a co-worker? *Rankin v. McPherson*, 483 U.S. 378 (1987) (deputy constable terminated when a co-worker overheard a comment she had made about an assassination attempt ["if they go for him again, I hope they get him"]). In *Rankin*, this Court found that the "inappropriate or controversial character of [the] statement [was] irrelevant to the question whether it deals with a matter of public concern." *Id.* at 387. Yet this remark "is a far cry from the question by the Assistant District Attorney in *Connick* whether her co-workers 'ever [felt] pressured to work in political campaigns.'" *Id.* at 397 (1987) (Scalia, J., dissenting). It also pales in comparison to the serious expression of other plaintiffs: *Pickering v. Bd. of Educ.*, 391 U.S. at 566 (letter to Board of Education about financing school construction); *Perry v. Sindermann*, 408 U.S. at 595 (teacher's legislative testimony); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 282 (1977) (letter regarding teacher dress and appearance); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 413 (1979) (teacher privately expressed concerns to her principal

about the school's racial discrimination). Parsing the public-private distinction is indeed challenging.

At times the public concern is obvious—but not always. *Garcetti* added another layer of analysis by requiring that the employee speak as a private citizen, not as a public official. Although the latter expression is "government speech" governed by a different set of principles, the new test adds complexity—particularly since public employees may be best situated to know about internal matters that concern the public. The Ninth Circuit grappled with this issue in the past—but *Garcetti* might now foreclose these plaintiffs' actions: *Gillette v. Delmore*, 886 F.2d 1194, 1196 (9th Cir. 1989) (firefighter's comments to fire captain about use of excessive force in taking drug overdose victim to the hospital); *Hyland v. Wonder*, 972 F.2d 1129, 1137 (9th Cir. 1992) (memorandum "exposed abuses, inefficiency, threats to public safety, potential civil rights violations, and incompetence of public law officials at Juvenile Hall"), *Voigt v. Savell*, 70 F.3d 1552 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1826 (1996) (state court clerk terminated for criticizing presiding judge's selection of court administrator and determining that an employment applicant's grievance was valid—the unfair discrimination was a public concern).

Multi-tiered retaliation introduces another complicating factor. The Fourth Circuit considered the case of a police officer who testified truthfully about a fellow officer's failure to maintain his vehicle—a private concern. *Kirby v. City of Elizabeth City*, 388 F.3d at 449. But retaliation occurred in response to Kirby's truthful testimony—retaliation that could have a chilling impact on officers called to testify in future inquiries. Here the court found a public concern. *Id.*

Guarnieri's case arguably satisfies the "public concern" requirement, in light of the original events that triggered his grievance and the implications of the retaliatory directives:

- The original discharge occurred after Guarnieri refused the Council's request that he lobby the Mayor to sign a proposed ordinance unrelated to his job with the Police Department. Opp. Pet., 1. This is a classic example of compelled speech, and the proposal—about a reorganization of the Sewer Authority—arguably concerns the public.

- On close examination, the directives implicate public concerns. The prohibition of overtime may seem "purely private," but public safety is jeopardized if the police chief must abruptly stop working at a particular time even if he is handling an arrest or other emergency. Opp. Pet., 3.

The public concern test is helpful if used as a shield to protect the ability of public employees to participate in public discussions. But this content-based test should not be employed as a sword to create a "judicially approved catalogue of legitimate subjects of public discussion" that severely narrows the First Amendment. Pave, 90 Nw. U. L. Rev. at 314 n.58, citing Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 Geo. Wash. L. Rev. 1, 3 (1990).

Even federal courts disagree about what is or is not a matter of "public concern" in the operation of a government agency. How can the average

employee—with a meritorious, non-sham claim—be expected to second-guess the courts and decide whether to gamble on losing his livelihood?

1. The Efficient Operation Of *Any* Government Entity Is A Matter Of Public Concern.

Even in *Connick*, the public-private dividing line was disputed among this Court's justices. Justice Brennan observed that the operation of the government *always* concerns the public:

> It is hornbook law...that speech about "the manner in which government is operated or should be operated" is an essential part of the communications necessary for self-governance the protection of which was a central purpose of the First Amendment. *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

Connick, 461 U.S. at 156 (Brennan, J., dissenting). In *Connick*, the questionnaire at issue contained questions relevant to the operation of the district attorney's office, but only one of them ultimately passed the "public concern" threshold, contrary to the District Court finding that "[taken] as a whole, the issues presented in the questionnaire relate to the effective functioning of the District Attorney's Office and are matters of public importance and concern." *Myers v. Connick*, 507 F. Supp. 752, 758 (E.D. La. 1981). Important public issues "are often daily bread-and-butter concerns for the police, the intelligence agencies, the military, and many whose jobs involve protecting the public's health, safety, and the environment." *Garcetti v. Ceballos*, 547 U.S. at 448

(Breyer, J., dissenting). Government employees routinely handle matters vital to public health and safety—"police officers, firefighters, environmental protection agents, building inspectors, hospital workers, bank regulators, and so on." *Id.* Even the relationship between a public entity and an official—like the Borough's relationship with its police chief—concerns the public. *Perry v. Sinderman*, 408 U.S. at 603 (Burger, C.J., concurring) ("the relationship between a state institution and one of its teachers is essentially a matter of state concern").

The public employer in this case is the police—an entity with urgent duties to the public. Although some of the Borough's directives address routine internal matters, the austere limitation on working hours potentially threatens public safety. The Fourth Circuit considered the critical importance of uninhibited, truthful testimony by police officers, finding that "there is a strong public interest in ensuring that that process is not compromised." *Kirby v. City of Elizabeth City*, 388 F.3d at 450. "This is particularly true in the law enforcement arena. *See Brawner v. City of Richardson*, 855 F.2d 187, 191-192 (5th Cir. 1988) ('The disclosure of misbehavior by public officials is a matter of public interest and therefore deserves constitutional protection, especially when it concerns the operation of a police department.')." *Id.*

"[T]he threat of dismissal from public employment is...a potent means of inhibiting speech." *Pickering v. Bd. of Educ.*, 391 U.S. at 574; see *Keyishian v. Bd. of Regents*, 385 U.S. at 604. This Court "[has] frequently recognized the severity of depriving a person of the means of livelihood." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. at 543. A public employee may

be in the best position to know about government abuses—particularly wrongdoing that has a personal impact—but has the most to lose, either by speaking up *or* filing a valid petition to redress the grievance. Further expansion of the "public concern" test, threatening employees whose grievances are serious enough to warrant formal action, would only exacerbate the problem. "As a result, the public [could] be deprived of valuable information with which to evaluate the performance of elected officials." *Connick*, 461 U.S. at 170 (Brennan, J., dissenting).

2. A Dispute That Superficially Appears "Private" May Mask Underlying Government Wrongdoing That Should Be Exposed.

The public has a substantial interest in government transparency and accountability, but "the public matters standard, when applied to public employee petitions, allows government employers to avoid the very check on incompetence, corruption and waste that petitions are best designed to provide." Pave, 90 Nw. U. L. Rev. at 341. An ostensibly "private" dispute could be a cloak for underlying government mismanagement, inefficiency, corruption, or violation of constitutional rights. A "private" action for sexual harassment might expose a larger pattern of corruption that erodes employee morale and undermines the government agency's efficiency. Exposure promotes government efficiency rather than hindering it. Even in *Garcetti*, this Court cautioned that "[e]xposing governmental inefficiency and misconduct is a matter of considerable significance." *Garcetti v. Ceballos*, 547 U.S. at 425. Similarly, *Connick* reminded public employers that they should,

"as a matter of good judgment," be "receptive to constructive criticism offered by their employees." *Id.*, quoting *Connick*, 461 U.S. at 149.

Petitioning can be a "wholesome restraint upon official corruption, extravagance, and maladministration." *Ambrosius v. O'Farrell*, 119 Ill. App. 265, 270 (1905) (no libel recovery allowed for good faith petition to city council alleging that an official had committed a crime). Citizens employed by the government may be best situated to spot these problems and bring them to light. *Pickering v. Bd. of Educ.*, 391 U.S. at 572 (teachers have informed opinions about the allocation of school funds). The employee's right to disseminate information—or formally address the wrongdoing in a petition—is not the only interest at stake. The public also has a right to receive the information. *City of San Diego v. Roe*, 543 U.S. at 82 (2004).

Government wrongdoing encompasses constitutional violations. "When a violation of First Amendment rights is alleged, the reasons for dismissal or for nonrenewal of an employment contract must be examined to see if the reasons given are only a cloak for activity or attitudes protected by the Constitution." *Bd. of Regents v. Roth*, 408 U.S. at 582 (Douglas, J., dissenting) (no reason given for non-renewal of teacher's contract). Such violations always concern the individual(s) involved, thus implicating "private" concerns, yet the public also has an interest in assuring that government bodies comply with the Constitution.

B. The Petition Clause Protects A Public Employee's Formal Action For The Government Employer's Violation Of An Independent Constitutional Right—Whether Or Not It Implicates A "Matter Of Public Concern."

Government employers must respect a variety of constitutional freedoms—thought, religion, association, and the privilege against self-incrimination. *See Cole v. Richardson*, 405 U.S. 676 (1972) (invalidating loyalty oath); *Torcaso v. Watkins*, 367 U.S. at 490 (invalidating religious oath); *Shelton v. Tucker*, 364 U.S. 479 (invalidating required list of associations); *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551 (1956) (striking down mandatory termination of city employees invoking the Fifth Amendment). Not all of these involve public concerns. If a government employer is free to retaliate against an employee who successfully pursues a formal remedy for the violation of one of these rights, any victory the employee achieves will ring hollow. Such retaliation effectively conditions employment on the sacrifice of basic rights and is unconstitutional even for an at-will employee who has no protected right to employment. *Perry v. Sinderman*, 408 U.S. at 596-597. *See also R.R. Trainmen v. Va. Bar*, 377 U.S. 1, 7 (1964) (state cannot indirectly infringe rights to association and petition through regulation of attorneys).

Judicial deference to government employers must be exercised with one eye on the Constitution:

> In the *absence* of any claim that the public employer was motivated by a desire *to curtail or to penalize the exercise of an employee's*

> *constitutionally protected rights*, we must presume that official action was regular and, if erroneous, can best be corrected in other ways.

Bishop v. Wood, 426 U.S. 341, 349-350 (1976) (emphasis added).

Many of the Circuit cases are distinguishable because no constitutional rights are implicated—and legitimate business concerns overshadow any retaliatory motive: *Tang v. Dept. of Elderly Affairs*, 163 F.3d at 12 (minor workplace inconveniences), *Martin v. City of Del City*, 179 F.3d at 884 (lateral transfer of employee accused of sexual harassment), *Hoffman v. Mayor of Liberty*, 905 F.2d at 231 (disrespectful, abusive police employee rehired to lower position to prevent contact with the public), *Renfroe v. Kirkpatrick*, 722 F.2d 714 (non-tenured full-time teacher offered part-time position due to budget constraints). But in *this* case, Guarnieri's original grievance was triggered by a constitutional violation—compelled speech—when the Council insisted that he lobby the Mayor on a matter unrelated to his duties. Such official pressure is a "coercion of belief in violation of fundamental constitutional rights." *Branti v. Finkel*, 445 U.S. at 515-516. *See also Ex Parte Curtis*, 106 U.S. 371, 373-374 (1882) ("A feeling of independence under the law conduces to faithful public service, and nothing tends more to take away this feeling than a dread of dismissal.")

1. Petition Claims Often Implicate Other Constitutional Rights.

Courts examine the substance of a public employee's petition to determine whether it merits

Petition Clause protection. *Belk v. Town of Minocqua*, 858 F.2d at 1262 ("[O]nly if the substance of Belk's threatened grievance is deserving of first amendment protection does her allegedly retaliatory discharge violate the petition clause.") Petition cases often involve independent constitutional rights. *Day v. S. Park Indep. Sch. Dist.*, 768 F.2d at 701 ("Other decisions that rest in part on the right-to-petition clause involve the exercise of first amendment rights in addition to the right to petition.")

There is no cookie-cutter approach to examining constitutional claims. *Rendish v. City of Tacoma*, 123 F.3d at 1223 n. 3 ("We do not mean to imply that all First Amendment rights must be treated the same in the public employment context.") It is entirely possible that a public employee's formal grievance might implicate a constitutional right that warrants review even though it involves no public concerns—due process, equal protection, religion, association, compelled speech. Even if speech inside the workplace must relate to a "public concern" in order to accommodate the government employer's reasonable need for order and discipline in that context, this is not necessarily true of all other rights.

2. Second Level Retaliation Requires Careful Review.

An employer's wrongful conduct may set off a chain reaction. Some links in that chain may implicate only private concerns, while others involve public matters. "Second-level retaliation ... is retaliation for challenging an earlier alleged retaliatory act." *Kirby v. City of Elizabeth City*, 388 F.3d at 449. Officer Kirby alleged two levels of retaliation—first, a reprimand for his

testimony; second, a demotion for filing a grievance and lawsuit. Although the content of his testimony involved a private matter, the Fourth Circuit identified a matter of public concern because "the allegedly unwarranted reprimand could have a significant chilling effect on testimony relating to matters of public as well as private concern." *Id.* at 450. Similarly, a police officer stated viable petition claims related to his release of an internal memorandum to the press. *Andrew v. Clark*, 561 F.3d at 269. The memo related to the use of deadly force against a barricaded suspect—a public concern. The first level of retaliation was an internal investigation over the incident; the second level was the officer's termination for threatening to file suit. *Id.*

In multi-level situations, causation is a key factor: "[D]id retaliation for protected activity cause the termination in the sense that the termination would not have occurred in its absence?" *Prof'l Ass'n of Coll. Educators v. El Paso Cnty. Cmty. Coll. Dist.*, 730 F.2d 258, 266 (5th Cir. 1984) (state college attempted to destroy a faculty association through intimidation and denial of privileges). If the government's "improper motive sets in motion the events that lead to termination that would not otherwise occur, 'intermediate steps in the chain of causation' do not necessarily defeat the plaintiff's claim. *Bowen v. Watkins*, 669 F.2d 979, 986 (5th Cir. 1982)." *Id.* This analysis parallels the familiar tort law notion of proximate cause. Here, the Council's improper lobbying request appears to have set in motion events that led to Guarnieri's wrongful termination and later the retaliatory directives after his reinstatement.

3. Private Causes Are Protected By The Constitution.

The First Amendment protects a broad spectrum of causes—political, religious, or even "great secular causes." *Thomas v. Collins*, 323 U.S. at 531. Rights of petition and association encompass private "business and economic interests." *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. at 510-511. "[T]he petition clause itself is not generally limited to matters of 'public concern' as described in the *Connick* case but includes the petitioner's private business interests." *Gable v. Lewis*, 201 F.3d at 771.

An employee's "complaints within the chain of command" are not entitled to Petition Clause protection—as the Third Circuit concedes. *Foraker v. Chaffinch*, 501 F.3d at 247. Nor are actions undertaken in the employee's official capacity. *D'Angelo v. Sch. Bd.*, 497 F.3d 1203 (principal acted in public capacity in speaking and petitioning to have high school converted to a charter school). But when an employee files a formal action against a public employer, there will virtually *always* be private interests—continued employment, compensation, perhaps an injunction. The only reason to restrain those interests is to enable the public employer to "maintain order, disciple and civility in the workplace." *Gable v. Lewis*, 201 F.3d at 771. Such restraints should be narrowly tailored so as to minimize the constitutional burden. As this Court has repeatedly held, "laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of

dealing with such an evil." *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. at 222.

CONCLUSION

Even as an employer, the government is still subject to constitutional constraints. One of these is its obligation to maintain an open avenue for all citizens—including those it employs—to seek legal remedies for genuine grievances. The Third Circuit rationale upholds that obligation by drawing the line between true and sham petitions, rather than between public and private concerns.

Respectfully Submitted,

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